No. 97-47

In The

Supreme Court of the United States

October Term, 1996

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

vs.

PFIZER INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PFIZER INC. AND SHILEY INCORPORATED

DAVID KLINGSBERG
Counsel of Record
MARIS VEIDEMANIS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
Attorneys for Respondents
Pfizer Inc. and Shiley Incorporated
425 Park Avenue
New York, New York 10022
(212) 836-8000

Of Counsel:

JAMES R. ADAMS
FROST & JACOBS
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

71679 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

Under the principle that this Court does not resolve questions not raised in the lower courts, may certiorari be granted to review issues that were *not* before the Sixth Circuit on the current appeal but were raised in two previous petitions for certiorari in this case (Nos. 93-1912 and 94-843), which were denied in *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994), and *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995)?

Should certiorari be granted to review the only issue raised below (other than attorney's fee issues), *i.e.*, the Sixth Circuit's per curiam affirmance of the district court's denial of petitioners' motion to intervene on the ground that it was untimely, where:

— the petition sets forth no "compelling reasons" why this Court should grant review with respect to the denial of intervention, thus failing to comply with Sup. Ct. Rule 10;

— final judgment had already been entered, and there have been seven unsuccessful appeals by these petitioners and two denials of certiorari;

— the settlement has been implemented and petitioners have accepted their share of the proceeds.

Are there any compelling reasons warranting certiorari review of the district court's rulings on petitioners' motions for attorney's fees and related fee hearings?

Have petitioners' numerous and often untimely filings at all three levels of the federal courts created a procedural context so peculiar to this case as to make the issues presented unsuitable for a grant of certiorari?

STATEMENT PURSUANT TO RULE 29.6

Respondent Shiley Incorporated is a wholly-owned subsidiary of respondent Pfizer Inc. Shiley Incorporated has no subsidiaries that are not wholly-owned.

Respondent Pfizer Inc. has no parent company. The following is a list of its direct or indirect subsidiaries (except those that are wholly-owned):

Subsidiary	Place of Incorporation
Anaderm Research Corp.	Delaware
*Community Health Care Solutions LLC	Delaware
*Healthcare Market Research	New York
Laboratoire Beral, S.A.	France
Pfizer Egypt S.A.E.	Egypt
Pfizer Korea Limited	South Korea
Pfizer Limited	Ghana
Pfizer Limited	India
Pfizer Pharm Algerie SPA	Algeria
Pfizer Pharmaceuticals Ltd.	People's Republic of China
Pfizer S.A.	France
PT. Pfizer Indonesia	Indonesia

*50/50 Joint Ventures

This Statement is prepared and dated as of July 30, 1997.

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The Petition for a Writ of Certiorari seeks review of five issues, none of which is appropriate for certiorari.

Issues relating to standing and class settlement approval, raised by petitioners' fifth Question Presented, were not even before the Sixth Circuit in the appeals for which review is sought. Rather, these issues were the subject of petitioners' two prior petitions for certiorari in this case (Nos. 93-1912 and 94-843), which this Court denied on October 3, 1994 and January 9, 1995, and which the petition does not even mention. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994); *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995). It is well settled that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *Accord, Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (a "question . . . not raised in the Court of Appeals . . . is not properly before us").

Only two issues were raised in the Court of Appeals in the order from which certiorari is now sought. The first relates to the district court's denial of petitioners' untimely motion to intervene. Contrary to Sup. Ct. Rules 10 and 14(h), the petition for certiorari does not even present the reasons why review should be granted regarding the denial of petitioners' untimely intervention motion, although this issue is included in petitioners' third and fourth Questions Presented.

In any event, the timeliness of the motion to intervene is a factual and discretionary issue that was properly decided by the district court and is unsuitable for certiorari review. The final judgment approving the settlement was entered long ago, on September 10, 1992. Petitioners have filed seven appeals and two previous certiorari petitions, all of which have been rejected, regarding a class settlement from which they were free to opt out but chose not to do so. The settlement has now been

implemented, including the distribution of proceeds to class members, which were received and accepted by these very petitioners. This unique procedural setting is unlikely ever to be repeated, and thus has little importance to the development of the case law.

The second issue presented in the petition that was decided below (raised in the first and second Questions Presented) relates to the denial of petitioners' application for attorney's fees. This issue, as well, was particular to this litigation and is thus inappropriate for review by this Court.

ADDITIONAL OPINIONS BELOW

The district court's order denying petitioners' motion for reconsideration of the denial of their motion to intervene is reproduced in petitioners' Appendix ("App.") at 141 and reported at 159 F.R.D. 492 (S.D. Ohio 1994). The district court's orders regarding petitioners' motions concerning attorney's fees are reproduced at App. 5-16. The Sixth Circuit's order affirming the district court's orders is reproduced at App. 1. The Sixth Circuit's order denying petitioners' petition for rehearing *en banc* is reproduced at App. 3.

STATEMENT OF THE CASE

A. Procedural Background Set Forth In Opposition To Petitioners' Two Prior Certiorari Petitions.

Many of the following procedural facts were set forth in respondents' briefs in opposition to petitioners' two earlier certiorari petitions, which this Court denied. They are summarized here for the convenience of the Court.

This action was filed on April 19, 1991 on behalf of

recipients of an artificial heart valve, and their spouses. Even though the plaintiffs' valves were functioning normally, they alleged anxiety about the possibility that the device might fail at some unknown future time, as a small percentage had.[1] A settlement agreement was entered into on January 23, 1992. Record ("R.") 48, attachment.[2] The settlement provided not only cash payments, but also medical and health benefits which the overwhelming majority of class members — many of whom are aged and ill from their underlying heart disease — desired and have since received.

Pursuant to Fed. R. Civ. P. 23(e), the district court conducted a fairness hearing on the proposed settlement on June 5, 8-9 and July 22, 1992. Contrary to statements in the Petition (Pet. at 3), the four-day fairness hearing involved a voluminous evidentiary record. *See, e.g.*, R. 161-63, 195-96, 202, 207-08, 225-26, 237, 251. In addition to oral argument, the court received extensive submissions by petitioners and others, including affidavits from medical and damages experts, documents and deposition excerpts. *Id.* Petitioners, other class members and consumer advocacy groups were heard at length. Petitioners themselves submitted seven briefs totaling 369 pages and one letter, with attachments totaling 167 pages. R. 143, 159-60, 190, 221, 228, 235, 242. As a result of suggestions by the court and counsel, the initial settlement agreement was enhanced. Except for petitioners (two implantees and one spouse), all class members who were represented by counsel, along with consumer advocate *amici*, then withdrew their objections in view of the enhancements. *See* R. 251 at 56-61.

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1. Artificial heart valves, made of metal and synthetic materials, are surgically implanted to save the lives of those with diseased and failing human heart valves. Respondent Shiley was a pioneer in developing artificial heart valves, which have saved tens of thousands of lives.

2. Citations to the record are to the district court docket numbers.

On August 19, 1992, the district court issued a 68-page order finding that the settlement is "fair, adequate and reasonable." *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 170 (S.D. Ohio 1992). Judgment was entered on September 10, 1992. R. 255. Petitioners filed a notice of appeal from that judgment on September 17, 1992. R. 258. At no time prior to their filing of a notice of appeal did petitioners move to intervene.

On September 25, 1992, eight days after they had filed their first notice of appeal, petitioners belatedly filed a motion in the district court to intervene for purposes of appeal. R. 265. In an order dated November 9, 1992, the district court concluded that it could not decide the motion to intervene because the filing of the notice of appeal had divested it of jurisdiction. R. 297. Petitioners appealed from that decision as well. R. 305.

On March 2, 1993, while the above appeals were pending, petitioners filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(2), (3) and (6). R. 315. By an order dated March 26, 1993, the district court examined each of the asserted grounds for the Rule 60(b) motion and concluded that there was no basis for it to request a remand from the Court of Appeals. R. 335. The court held that some of the matters raised in the motion "were already considered" in approving the settlement, and that "[m]any of the 'newly discovered' matters . . . were actually known by [petitioners], or with reasonable diligence could have been discovered at the time of the fairness hearing." *Id.* at 241. Petitioners appealed. R. 337. On June 9, 1993, the Sixth Circuit dismissed that appeal because the district court's order declining to request a remand was not an appealable order. 1993 WL 196059, 995 F.2d 1066 (6th Cir. 1993).

In an order dated December 21, 1993, the Sixth Circuit affirmed the district court's order declining to rule on petitioners' motion to intervene, concluding that the district court had no

jurisdiction after a notice of appeal was filed. 1993 WL 533620, 14 F.3d 600 (6th Cir. 1993).

Also on December 21, 1993, the Court of Appeals dismissed petitioners' appeal from the judgment approving the class settlement. App. 299. The Court held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." App. 300. On March 4, 1994, the Court of Appeals denied a petition for rehearing *en banc*. Petitioners then filed a petition for certiorari, which this Court denied on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994).

After petitioners' appeal was dismissed, the district court regained jurisdiction and ruled on the pending motions. On April 5, 1994, the court denied the motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." R. 363. Petitioners did not appeal from that order. Instead, on April 13, 1994, they filed a motion in the district court under Fed. R. Civ. P. 59(e) for reconsideration of the denial of their motion to intervene. R. 371.

On April 12, 1994, the district court denied petitioners' Rule 60(b) motion. R. 368. On May 3, 1994, petitioners appealed the denial of that motion. R. 379. Having previously ruled that petitioners lacked standing to appeal from that same judgment, on May 17, 1994 the Court of Appeals issued an order requiring petitioners to show cause why the appeal should not be dismissed. Petitioners then moved the Court of Appeals to remand to the district court for a ruling on their motion for reconsideration of the denial of their motion to intervene.

On August 8, 1994, the Court of Appeals issued an order

dismissing the appeal from the denial of petitioners' motion to vacate the judgment, reasoning that because petitioners were non-party class members whose motion to intervene had been denied, they lacked standing to appeal from the denial of a motion seeking "to vacate the very settlement as to which this court earlier concluded the [petitioners] lacked standing to challenge." R. 404. Petitioners' motion for a remand was denied as moot. *Id.* Petitioners then filed a second petition for certiorari, which this Court denied on January 9, 1995. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995).

B. Subsequent Procedural History.

On November 23, 1994, the district court denied petitioners' motion for reconsideration of the denial of their motion to intervene, holding that "[t]o postpone the benefits of the settlement for another round of appeals would . . . be prejudicial to the members of the class." App. 146. The court further pointed out that intervention would not accomplish petitioners' stated goal of appealing the judgment approving the settlement, because "[t]he time for appeal of that judgment has now passed." App. 149.

On September 5, 1995 the court denied petitioners' application for attorney's fees and their motion to participate in the hearing regarding class counsel's fees. App. 7.

Petitioners appealed to the Sixth Circuit from the orders regarding attorney's fees and denying their motion to intervene. On December 16, 1996, the Court of Appeals affirmed the district court's orders regarding petitioners' application for attorneys' fees and motion to intervene. App. 1. Petitioners' request for rehearing *en banc* was denied on February 28, 1997. App. 3. This latest petition for certiorari seeks review of the Sixth Circuit's order of December 16.

In all, petitioners' contentions regarding the *Bowling* settlement have been rejected by eight different judges of the Sixth Circuit. Not one Sixth Circuit judge has concluded that an *en banc* review was warranted.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES REGARDING PETITIONERS' APPLICATION FOR ATTORNEYS' FEES ARE NOT WORTHY OF CERTIORARI REVIEW BY THIS COURT.

These attorney's fees issues are not worthy of certiorari review because they are discretionary orders based on the unique facts of petitioners' fee application, and have no broader applicability. Sup. Ct. Rule 10; *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121-23 (1994).[3]

II.

CERTIORARI MAY NOT BE GRANTED ON ISSUES THAT WERE NOT RAISED IN THE CIRCUIT COURT AND ARE NOT RELEVANT TO THE ORDERS FROM WHICH REVIEW IS NOW SOUGHT.

This Court should not grant review of the Sixth Circuit's previous orders regarding appellate standing, because the standing issue was not before the courts below and was the subject of two prior certiorari petitions that this Court denied. In addition, the issue is moot as to these petitioners, whose time to appeal has run. Finally, review is unnecessary because the rules of appellate standing are clear and there is no split among the Circuits.

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3. Defendants have taken no position in the courts below with respect to attorney's fees or the conduct of the fee hearings.

A. The Appellate Standing Issue Was Not Before The Courts Below, And Was Already Raised In Two Prior Certiorari Petitions That This Court Denied.

It is well established that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *Accord, Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (a "question . . . not raised in the Court of Appeals . . . is not properly before us"). This, petitioners' third petition for certiorari, largely reiterates arguments in the two earlier petitions (Nos. 93-1912 and 94-843) that this Court denied. *Ridgeway v. Pfizer, Inc.*, 513 U.S. 916 (1994); *Ridgeway v. Pfizer, Inc.*, 513 U.S. 1103 (1995). For example, petitioners repeat the same meritless contention regarding a prior Sixth Circuit ruling concerning petitioners' standing; rely upon substantially the same cases; and make the same policy arguments. Pet. at 24-25. This standing issue, however, was not before the courts in the proceedings from which review is now sought.

Petitioners should not be permitted to raise the same issues again and again in repetitive certiorari petitions in the same case. After this Court denied the first petition for certiorari, the district court began implementing the settlement. Now, after two certiorari petitions have been denied, the settlement has been implemented and funds have been distributed to tens of thousands of class members — including petitioners, who accepted them. Eventually, litigation must come to an end. Certiorari should be denied for this reason alone.

B. The Judgment Approving The Settlement Is Final And Unappealable, And The Appellate Standing Issue Is Therefore Moot As To These Petitioners.

Yet another reason why certiorari is inappropriate regarding the appellate standing issue is that the question is moot as to

these petitioners. Their time to appeal from the orders approving the settlement and denying their Rule 60(b) motion has now expired,[4] their appeals have been dismissed and certiorari has been denied. The Court of Appeals correctly determined that petitioners may not retroactively revive their appeals. *See* R. 404 (quoted at App. 150), citing *Jenkins v. Missouri*, 967 F.2d 1245 (8th Cir.), *cert. denied*, 113 S. Ct. 811 (1992) (appeal that is dismissed for lack of standing cannot be revived if appellant later acquires standing after the time to appeal has expired). *Accord, Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 99 (1994) (jurisdiction attained after the deadline for appeal does not "relate back" to an earlier-file defective appeal, because "[t]he time of appealability, having jurisdictional consequences, should above all be clear") (citation omitted). Moreover, even if petitioners could revive their appeal, the settlement that they seek to overturn was approved in 1992 and has already been fully implemented, a process that cannot now be undone.

C. There Is No Split In The Circuit Courts — Every Court That Has Directly Addressed The Question Of Appellate Standing Of Absent Class Members Has Correctly Decided The Issue Consistent With This Court's Precedent And Rule 23.

In addition, review should be denied because there is no split in the Circuits — a point petitioners unsuccessfully argued

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4. Those orders were entered on September 10, 1992 and March 26, 1993, respectively. R. 255, 335. The 30-day period of time to appeal has therefore expired. *See* 28 U.S.C. § 2107(a) ("no appeal shall bring any judgment, order or decree . . . before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree"); Fed. R. App. P. 4(a)(1) ("the notice of appeal . . . must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from").

in prior certiorari petitions.[5] As respondents pointed out in opposition to the two previous petitions, the standing issue was resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), which held that under Fed. R. App. P. 3(c) "only parties to a lawsuit, or those that properly become parties [by intervening], may appeal an adverse judgment." Since *Marino*, every Circuit presented with an appeal from a class action judgment brought by non-party class members has ruled that non-party class members — like petitioners — have no standing to appeal. *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *In re Brand Name Prescription Drugs Antitrust Lit.*, 115 F.3d 456 (7th Cir. 1997) (petition for rehearing filed); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/ Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

These holdings are supported by Fed. R. Civ. P. 23 and 24, which make clear that absent intervention, class members are *not* parties to the action and do not have the unqualified right to participate at every stage of the litigation in the district court and on appeal. Rule 23 sets forth a procedure through which common issues can be litigated efficiently in a single suit, and is structured to enable each class member to have "procedural due process protection[s]" without becoming "fully a party in the traditional sense." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 811-12 (1985). Rule 23's goals of manageability and efficiency would be compromised if each class member could individually decide to appeal. Moreover, permitting appeals by non-party class members would be inconsistent with the representative nature of class actions. Finally, an automatic right of appeal by non-party class members without intervention is

5. *See* the petition in Case No. 93-1912 at 12-18 and the petition in Case No. 94-843 at 12-19.

unnecessary to protect their individual interests, because in Rule 23(b)(3) actions such as this class members can protect their interests by opting out and pursuing their own actions.

The cases that petitioners cite to show an alleged "split" either were decided prior to *Marino*[6] or did not directly present the issue. Not one of the post-*Marino* cases on which petitioners again rely granted non-party class members standing to appeal from a judgment approving a settlement in a class action or from an order refusing to vacate such a judgment. *See In re VMS Ltd. Partnership Securities Lit.*, 976 F.2d 362 (7th Cir. 1992) (non-party class members did *not* have standing to appeal a subsequent order implementing a settlement agreement); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307 n.4 (3d Cir. 1993) ("we need not decide whether different rules apply to objector appellate standing in class and derivative suits"); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993) (stating in dictum, in an interlocutory appeal from the denial of a class member's motion to intervene, that class members who timely moved to intervene could appeal from a final judgment).

Thus, contrary to petitioners' repeated argument, there is no conflict in the case law, and the rule that has been adopted by every Circuit that has specifically considered the issue is consistent with this Court's precedent and the purpose of Rule 23. Accordingly, even if certiorari were permitted for issues not raised in or pertinent to the Court of Appeals decision from which review is sought, there is no reason to grant review, as this Court already concluded in denying the previous petitions for certiorari.

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6. *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971); *In re Cement Antitrust Lit.*, 688 F.2d 1297 (9th Cir. 1982).

III.

CERTIORARI REVIEW OF THE MERITS OF THE FINAL AND FULLY IMPLEMENTED JUDGMENT IS INAPPROPRIATE AND UNNECESSARY.

Petitioners assert that this Court's decision in *Amchem Products, Inc. v. Windsor*, __ U.S. __, 1997 WL 345149 (June 25, 1997), justifies certiorari review of the final and implemented judgment in this case. Review is not permitted or warranted for three separate reasons. First, the judgment approving the settlement was not before the courts in the proceedings below, and the merits of the judgment were the subject of two prior appeals by these petitioners, for which this Court denied certiorari. Second, under the doctrines of finality and res judicata, plaintiffs cannot seek to reopen the judgment even if there were a change in the case law. Third, the settlement here is entirely consistent with *Amchem*.

A. The Merits Of The Final And Implemented Judgment In This Case Were Not Before The Courts Below.

On this issue as well, certiorari should not be granted to review questions that were not before the lower courts. *Youakim*, 425 U.S. at 234. Petitioners here seek review of a Sixth Circuit decision which only considered and affirmed the district court's denial of their motions regarding attorney's fees and their untimely motion to intervene. The propriety of the judgment approving the settlement, whether in light of *Amchem* or otherwise, was not before the lower courts on those motions, but was the subject of two prior appeals which were dismissed by the Court of Appeals and for which certiorari was denied. *See Bowling v. Pfizer Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dismissed*, 14 F.3d 600 (6th Cir. 1993), *cert. denied*, 513 U.S. 916 (1994). Petitioners do not contend or show that any

aspect of *Amchem* has anything to do with the Sixth Circuit order that is the subject of this latest petition. Under these circumstances, petitioners should not be permitted to obtain review of the judgment approving the settlement.

B. The Judgment Is Final And Has Been Implemented.

Certiorari also is inappropriate because the judgment has been final for years, and petitioners' time to appeal the merits of the settlement expired long ago. The settlement — including the distribution of more than $100 million to date — has been implemented, and class members have received payments and other benefits that cannot be returned. The final judgment with respect to the merits of the settlement, and the implementation of the settlement, preclude relitigation and attempts to overturn the settlement at this late date in appeals unrelated to these issues.

Petitioners could not reopen the judgment even if there were a subsequent and controlling change in the governing law (which as shown below has not occurred). Finality is not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In *Moitie*, the Court explained that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Id.* at 401 (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)). *See also Barzin v. Selective Service Local Board No. 14*, 446 F.2d 1382 (3d Cir. 1971) (validity of prior decision is not affected by a subsequent contrary judicial decision); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996) (district court abused its discretion in granting Rule 60(b) motion in light of new decisional law).

Here, petitioners were given the opportunity to opt out of the settlement after being notified of its terms, but chose to remain in the class. The settlement has been implemented, and petitioners themselves have accepted their share of the proceeds. The appeal from the judgment approving the settlement has been dismissed and certiorari has been denied. The judgment has been attacked under Rule 60, the attack has been rejected, the appeal from that order has been dismissed and certiorari again denied.

Moreover, the judgment approving the settlement is no less final merely because petitioners have sought to keep this litigation alive through repeated appeals from collateral orders. It is well established that a final judgment for which the time to appeal has expired cannot be re-opened. *See Cherokee Express, Inc. v. Cherokee Express, Inc.*, 924 F.2d 603, 607-08 (6th Cir. 1991) (where appeal was dismissed as untimely, judgment was final for purposes of res judicata and could not be contested in later appeal from contempt order); *Morgan v. Union Metal Mfg.*, 757 F.2d 792, 795 (6th Cir. 1985) (where time to appeal from order of dismissal had expired, plaintiff could not, on appeal from order regarding attorney's fees, raise merits of dismissal order). Petitioners' appeals on the merits of the settlement have been exhausted, and accordingly the settlement cannot be attacked on this appeal from an unrelated order.

C. The Final Judgment Is Consistent With The Standards Set Forth In *Amchem*.

Finally, even if it were appropriate to open the final judgment for further review at this late date, certiorari should be denied because the judgment here is consistent with and, indeed, supported by *Amchem*. The Third Circuit's decision in *Amchem* explicitly cited the *Bowling* settlement with approval, noting the positive aspects of *Bowling* that were not contained in the *Amchem* settlement and led to reversal. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 631 (3d Cir. 1996).

The *Bowling* settlement had none of the disparities among class members' claims that were present in *Amchem*. Thus, common questions predominated. In particular, *Bowling* involved one product (the Bjork-Shiley C/C heart valve), which had a single alleged defect (possibility of outlet strut fracture), and was manufactured by one defendant "in a similar manner for all the class members." 143 F.R.D. at 158, 159. Further, all class members allegedly sustained the same injury, "emotional distress relating to fear of fracture of a working valve," which was the single claim finally settled for all class members and for which each class member received "an equal cash payment." *Id.* at 150, 149; *see id.* at 158-59. In light of these similarities, "the Defendants' conduct with regard to all implantees arises out of a single nucleus of operative facts and law." *Id.* at 158.

Amchem also stands in stark contrast to *Bowling* on the issue of adequacy of representation and, in particular, "conflicts of interest between named parties and the class they seek to represent." *Amchem*, Opn. at 3, 20. There were no such conflicts within the *Bowling* class or in the terms of the class settlement. The district court fully analyzed the Rule 23(a) requirement of adequacy of representation, and specifically examined "(1) whether the named representatives have common interests with the unnamed members of the class; and (2) whether the named representatives will vigorously prosecute the interests of the class through qualified counsel" — the factors deemed relevant in *Amchem* — but reached the opposite conclusion from *Amchem* for a number of reasons. *Bowling*, 143 F.R.D. at 159.

First, the only alleged conflict raised by petitioners in *Bowling* was between Pennsylvania class members and other class members, which they argued warranted a subclass of Pennsylvania implantees. The district court addressed this objection and found no basis to treat Pennsylvania class members differently because "the law in Pennsylvania looks no more

favorable than any other state" — petitioners have no viable claim for alleged emotional distress regarding a functioning valve. *Id.* at 161 (citing *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33, 34 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989); *see also Angus v. Shiley Inc.*, 989 F.2d 142 (3d Cir. 1993) (affirming summary judgment for defendants where plaintiff's heart valve had not failed and plaintiff alleged no direct physical injury). Notably, petitioners' counsel have acknowledged that their clients decided that "stay[ing] in the case and obtain[ing] the benefits from the *Bowling* settlement" was preferable to the result that they were likely to obtain in their lawsuit in Pennsylvania. App. 145.

Second, in contrast to *Amchem*, the *Bowling* settlement treats all class members alike, providing equal compensation for the single claim it settles. For other potential claims which might be brought by those whose valves fail or who require replacement surgery, there were no releases. Rather, class members received in effect unlimited back-end opt-out rights, permitting them to accept (or reject) guaranteed benefits in the event of a fracture or qualified valve replacement or to pursue litigation for such claims. Indeed, the Third Circuit in *Georgine*, 83 F.3d at 631, distinguished *Bowling* on the basis of its "delayed opt out" provision, indicating that such a provision also should have been incorporated into the *Georgine* settlement. Moreover, while the *Georgine* settlement provided no compensation for spouses, the *Bowling* settlement provides a "$10 million fund to be divided equally among all spouses of implantees." 143 F.R.D. at 170.

Finally, unlike the *Amchem* class action, which "was not intended to be litigated" (Opn. at 6), the district court found that the *Bowling* class action was "actively litigated" prior to settlement, 143 F.R.D. at 153, so that the *Bowling* class was not

burdened by conflicts of interest between named plaintiffs and other class members.[7]

In sum, the merits of the settlement are not before this Court because that was not an issue in the order from which certiorari is sought. In any event, the settlement is unassailable on this appeal, and is not affected by *Amchem*.

IV.

IN VIOLATION OF SUPREME COURT RULE 10, PETITIONERS PROVIDE NO REASONS TO SUPPORT CERTIORARI REVIEW OF THE DISTRICT COURT'S ORDER DENYING THEIR MOTION TO INTERVENE, WHICH WAS AN APPROPRIATE EXERCISE OF THE COURT'S DISCRETION BASED ON THE UNIQUE PROCEDURAL AND OTHER FACTS OF THIS CASE.

Apart from the attorneys' fees issues, the denial of petitioners' motion to intervene was the only issue before the Court of Appeals and therefore the only issue for which petitioners could seek certiorari review. But petitioners do not even attempt to explain why certiorari should be granted with respect to that issue. For that reason alone, certiorari should be denied. *See* Sup. Ct. Rules 10 and 14(h).

Even if this issue were properly raised in the certiorari petition, review should be denied because the district court's decision was a discretionary matter premised on the unique facts of this case. The court correctly exercised its discretion to decide

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7. This Court also raised a concern that notice in *Amchem* was inadequate because some class members may not know of their exposure to asbestos and thus may not realize the potential harm they face. Opn. at 34. This is plainly not a concern in *Bowling*, because class members are undoubtedly aware that they were implanted with a Shiley heart valve.

that petitioners could not intervene as of right or permissively in the *Bowling* class action.

First, intervention at this point would not serve any purpose. Even if petitioners were allowed to intervene, they could not accomplish the avowed aim of the intervention — to challenge the settlement on appeal. Their time to appeal from the orders approving the settlement and denying their Rule 60(b) motion has now expired and, as discussed in Point II, *supra*, the Court of Appeals correctly determined that petitioners may not retroactively revive their appeals. Moreover, even if they could revive their appeal, the settlement they seek to overturn was approved in 1992 and has already been implemented, a process that could not be undone.

The district court correctly ruled that petitioners' motion to intervene was not "timely," as expressly required by both Rule 24(a) and Rule 24(b). "If a [motion to intervene] is untimely, intervention must be denied." *NAACP v. New York*, 413 U.S. 345, 365 (1973).

The district court's finding that the motion was untimely may be reversed only for an abuse of discretion. "Timeliness . . . is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *Id.* at 366 (footnote omitted). As this Court has recognized, non-party class members must "promptly move[] to protect [their] interests" as soon as it is clear that those interests will no longer be protected by the named class representatives. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) (promptness in moving to intervene upon learning that named plaintiff would not appeal was a "critical fact" in finding intervenors' motion timely). Here, the district court acted well within its discretion in denying intervention to petitioners, who knew long before the settlement was approved

that they would probably seek to appeal but did not move to intervene until after filing their notice of appeal from the judgment and more than two months after the conclusion of the fairness hearing.

It is well settled that a motion to intervene after approval of a class action settlement, such as petitioners' motion, is untimely. *See, e.g., Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 584 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982) (it would be " 'unfair and inequitable' " to postpone " 'the long overdue relief accorded to the plaintiffs and class members . . . by the Consent Decree' "); *Michigan Ass'n of Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981) (same); *Moten v. Bricklayers, Masons & Plasterers*, 543 F.2d 224, 228 (D.C. Cir. 1976) (affirming as "well within the bounds of appropriate judicial discretion" denial of motion to intervene as of right filed after preliminary approval of class settlement); *In re Fine Paper Antitrust Lit.*, 695 F.2d 494, 500 (3d Cir. 1982) (affirming denial of motion to intervene filed after approval of class settlement; "a 'motion to intervene after entry of a decree should be denied except in extraordinary circumstances' ").

Another ground supporting the district court's discretionary ruling that the motion was untimely is that allowing intervention at this late stage would have prejudiced thousands of class members who, as a result of petitioners' endless procedural maneuvers, had to await since 1992 the full benefits of the settlement. As the court concluded: "By far the most compelling reason to deny [petitioners] the opportunity to intervene is to immediately begin the implementation of the settlement. . . . To postpone the benefits of the settlement for another round of appeals would indeed be prejudicial to the members of the class." *Bowling v. Pfizer, Inc.*, 159 F.R.D. 492, 496 (S.D. Ohio 1994), *aff'd*, 103 F.3d 128 (6th Cir. 1996). In contrast, intervention is not necessary to protect petitioners' rights, because they were

free to opt out if they did not like the settlement. Instead, they chose to remain in the class.

Furthermore, petitioners cannot intervene as a matter of right because their right to opt out precludes the requisite impairment of their interests. Intervention as of right is *not available* in opt-out class actions because "a class member who does not consider that he is being represented adequately has the option in a (b)(3) action to opt out under 23(c)(2) or to enter an appearance through counsel of his choosing." *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 332 (5th Cir. 1982). *Accord, Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976) ("the ability to opt out precludes the Intervenors from satisfying the impairment-of-interest test"). In view of that option, the judgment could not "impair or impede [appellants'] ability to protect [their] interest," as is required for intervention as of right. Rule 24(a)(2).

The district court also had broad discretion to deny petitioners' motion for permissive intervention under Rule 24(b). *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983). The same reasons — prejudice to class members, lack of prejudice to petitioners, and untimeliness — amply support the ruling on this aspect of the motion. There was no need for intervention, because petitioners were free to opt out but chose not to do so. *Head v. Jellico Housing Auth.*, 870 F.2d 1117, 1124-25 (6th Cir. 1989) (permissive intervention properly denied where the applicant had "other adequate means of asserting her rights" in a separate action). Moreover, petitioners' participation is no longer needed for any purpose: the attorney's fees proceedings in which they sought to participate are finished, and their involvement would not have been necessary or helpful. Petitioners' Rule 60(b) motion, which they hoped to appeal following intervention, has been denied and their appeal dismissed. Petitioners delayed the settlement in this case long

enough. The district court plainly did not abuse its discretion in denying permissive intervention.

Finally, certiorari is inappropriate with respect to the denial of petitioners' motion to intervene, which was based on the specific and unique facts of this case and was well within the discretion of the district court. The court's decision was based on the particular facts and circumstances before it, which present no "compelling reasons" for review. Sup. Ct. Rule 10. Petitioners have not even attempted to show that the court's ruling under those facts gave rise to any reversible error. Certiorari is inappropriate to assess the unique procedural and factual context in which the district court was immersed for several years, upon which it relied in its discretionary denial of the motion to intervene.

V.

PETITIONERS' NUMEROUS MISFILINGS HAVE CREATED A PROCEDURAL CONTEXT WHICH MAKES THIS CASE UNSUITABLE FOR REVIEW BY THIS COURT.

As respondents pointed out in opposition to the prior petitions for certiorari, the unusual procedural posture of this case — which was created by petitioners' numerous misfilings and is unlikely ever to be repeated — makes it unsuitable for review by this Court. As explained in Point I, *supra*, "[a] petition for a writ of certiorari will be granted only for compelling reasons" (Sup. Ct. Rule 10), in cases presenting issues of broad importance to the public and not merely to the litigants. *Ticor Title Ins. Co.*, 114 S. Ct. at 1362; *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

Petitioners' procedural zigs and zags have created a bizarre

set of facts which render this case unworthy of this Court's discretionary review:

• The procedural posture of the case is most unusual, where petitioners again seek certiorari after the Court of Appeals has rejected seven appeals and this Court has twice denied certiorari.

• In repetitive appeals and petitions for certiorari, petitioners have sought to overturn a settlement that they deliberately chose to join and from which they have already accepted monetary and other benefits. Such circumstances, if not unprecedented, are rare indeed.

• Petitioners had their own separate lawsuit (*Taylor*) pending against defendants in the Pennsylvania Court of Common Pleas, which they had been pursuing since 1986. They were free to opt out and pursue that case. Thus, petitioners' rights were adequately protected; they have not been deprived of any substantive right.[8]

• The district court gave petitioners the opportunity to opt out *and* object to the settlement at the fairness hearing. Indeed, the court gave petitioners second and third opportunities to opt out *after* their objections were heard. These opportunities — more than what was required by the Federal Rules — were rejected. Petitioners chose to remain in the class and sought to disrupt and delay the settlement that the class representatives and all other class members desired.

In sum, the atypical facts that resulted from petitioners' procedural maneuvers make this case unsuitable for certiorari review.

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8. Defendants' motion for summary judgment in *Taylor* was recently granted on the ground of *res judicata* because petitioners failed to opt out of the *Bowling* class, as they were free to do. *Taylor v. Shiley Inc.*, No. 2087 (Pa. Ct. Com. Pleas Phila. Co. June 30, 1997) (appeal pending).

CONCLUSION

This petition for certiorari should be denied, as were the last two that petitioners filed in this case.

Respectfully submitted,

DAVID KLINGSBERG
Counsel of Record
MARIS VEIDEMANIS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
Attorneys for Respondents
Pfizer Inc. and Shiley Incorporated
425 Park Avenue
New York, New York 10022
(212) 836-8000

Of Counsel:

JAMES R. ADAMS
FROST & JACOBS
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800